IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 165 OF 2006

Mohammed Rafique Khatri]
Proprietor of M/s. Rezwani Establishments]
age 50 years, having office at]
Sweekar Co-op. Housing Society,]
D/3, Khira Nagar, 3rd Floor,]
Flat No. 34, S.V. Road, Santacruz (West),]
Mumbai 400 054] …Applicant

V/s.

The Chief Engineer (BW),]
Mahanagar Telephone Nigam Limited,]
Bandra Telephone Exchange Building,]
8th Floor, Bandra Reclamation,]
Mumbai 400 050.] ...Respondent.

Mr. Basil Menezes for the Applicant

Mr. N.P. Shimpi for the Respondent.

CORAM: SWATANTER KUMAR, C.J.
JUDGMENT RESERVED ON: APRIL 13, 2007
PRONOUNCED ON: APRIL 19, 2007

JUDGMENT:-

1. The applicant has approached the Court under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to

as "the Act"), with a prayer that the Court may direct the respondent to appoint an Arbitrator in terms of Clause 53.1 of the Agreement bearing No. 108/EEDC/W-1/01-02 in respect of the claims mentioned in the letter dated 28th October, 2005, as the respondent has failed to appoint the Arbitrator, despite due notice and expiry of the prescribed period.

2. The necessary facts are that the applicant was awarded a contract to carry out the work of covering A/c duct by PoP False Ceiling of the 1st and 2nd floors of T.E. Building, Jogeshwari (West), Mumbai. This Agreement contained the Arbitration Clause, being Clause 53.1, which reads as under:-

> "All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of the Contract or the breach thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."

3. According to the applicant, upon execution of the work as awarded by the respondent, extra items of work were carried out as per order and direction of the respondent, for which the

payments were claimed, and certain disputes arose between the parties. The applicant, vide letter dated 1st September, 2004, set out the details of work executed as well as the claims. Copy thereof is annexed as Exhibit ' A'.

4. One P.K. Sharma, Deputy General Manager (Civil South MTNL), was appointed as the Sole Arbitrator to decide the claims of the applicant. However, in the letter dated 30th September, 2004, certain disputes were excluded; and all the disputes were not referred to the Arbitrator. Even before the Arbitrator, the applicant filed an application on 20th October, 2005, referring to his claim, but the same was not considered by the Arbitrator while making his Award.

5. Faced with the situation, the applicant, on 20th July, 2006, served upon the respondent a notice, specifying his claims and praying for a reference to the Arbitrator. The claims before the earlier Arbitrator could not be adjudicated, because there was no reference made.

6. The Agreement was made at Bombay; the contract was executed at Bombay; and the parties are residing and/or carrying on business at Bombay. The present application has been rightly filed at Bombay.

7. The main objection of the respondent in the present case was that despite opportunity given by the Arbitrator, the applicant did not present his claims properly. Thus, they could not be adjudicated. According to the respondent, no fresh claims can lie; and the present application should be dismissed.

8. One fact which cannot be disputed is that the applicant had served the notice upon the respondent on 1st September, 2004; and has specified all his claims, but the respondent, in his discretion, did not refer all the disputes. He, thereafter, again, served a notice upon the respondent on 20th July, 2006, but still, no reference was made.

9. It may be noticed that Clause 53.1 does not, in any way, debar the further reference. The Arbitration Agreement between the

parties is wide enough to include references, unless new reference of dispute arising from the contract entered into between the parties, except to the extent where such claims would be barred in law. Vide letter dated 20th July, 2006 (Exhibit "G"), the applicant had even informed the respondent that the proceedings were pending before the Sole Arbitrator already appointed and he would have no objection if the same Arbitrator would continue and decide the disputes then raised by the applicant. This letter was replied to by the respondent by his letter dated 1st August, 2006. The respondent answered as under:-

> "You (applicant) have now asked for reference of another five fresh claims. On going through them it is seen that:-
>
> a) Fresh claim No. 1 & 2 were already included in Claim No. 5 of reference dated 30.09.04 and hence they cannot be referred again on the Principle of Res Judicata.
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> b) Fresh claim No. 3 & 4 were not raised originally in your letter dated 1.9.04 and are now time barred as the limitation period of three years is over, as the final bill was passed on 16.1.02.
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> c) Since fresh claims at Sl. No. 1, 2, 3 and 4 cannot be referred for arbitration due to the reasons given

> therein, therefore clam No. 5 can also not be referred as the same (is) based on claim Nos. 1 to 4."

The above reply clearly shows that the respondent attempted to decide the merit of the disputes on facts and on question of law, rather than exercising the right available in terms of Clause 53.1 for referring the matter to the Arbitrator in accordance with that clause. This was certainly jurisdiction of authority which the respondent could exercise in accordance with law. In any case, the same will be of no consequence, as the Sole Arbitrator, vide his letter dated 5th August, 2006, specifically noticed as under:-

> "It is once again reiterated that the undersigned (Sole Arbitrator) has no jurisdiction to adjudicate the claims mentioned in Annexure 'D' of letter referred above, as they were not included in the reference."

This statement of the Arbitrator should have put at rest all the controversies; and, in fact, the respondent was obliged to refer the disputes which he himself failed to refer in furtherance to the claim dated 1st September, 2004. The Arbitration

Agreement, seen in the light of the statutory provisions of the Act, speaks of an obligation upon the respondent to make a reference in accordance with law. Certain enough, the applicant can also not keep on raising claims after claims based on the same facts and contract.

10. In view of the reasons recorded by me above, I would partly allow this application, and direct the respondent to make the reference and the disputes as claimed vide letter dated 20th July, 2006 (Exhibit "G"). However, it is clarified that only those disputes would be referred which were mentioned in the applicant's letter dated 1st September, 2004 and which were not referred earlier. The application is accordingly disposed of, leaving the parties to bear their own costs.

CHIEF JUSTICE.